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In the Supreme Court of the United States

OCTOBER TERM, 1991

MARY GADE, DIRECTOR, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Section 18(b) of the Occupational Safety and Health Act of 1970 provides that any State that desires to assume responsibility for development and enforcement of "occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated" shall submit a state plan to the Secretary of Labor for approval. 29 U.S.C. 667(b). The question presented is whether a State may develop and enforce "dual purpose" safety and health standards, which protect both workers and the general public, without submitting a state plan.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner seeks review of a court of appeals' decision holding that the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, requires a State to obtain federal approval before supplementing federal occupational safety and health standards with additional requirements that serve a "dual purpose" of protecting workers and the general public. The court of appeals vacated a district court decision holding that the OSH Act does not require federal approval of a particular "dual purpose"

provision of Illinois law, and it remanded the case for reconsideration of respondent's claims as to other provisions of Illinois law.

1. Congress enacted the OSH Act "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." § 2(b), 29 U.S.C. 651(b). To achieve that objective, Section 6 of the OSH Act authorizes the Secretary of Labor to establish "occupational safety and health standard[s]." 29 U.S.C. 655. The Act defines an "occupational safety and health standard" as

> a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

§ 3(8), 29 U.S.C. 652(8). The Secretary's federal standards establish a body of national regulations respecting specific occupational safety and health issues. See 29 C.F.R. Pt. 1910.

Section 18 of the OSH Act governs the extent to which the States may also assert jurisdiction over occupational safety and health issues. 29 U.S.C. 667. Section 18(a) makes clear that a State may continue to assert "jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect." 29 U.S.C. 667(a). Section 18(b) further provides, however:

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under [Section 6] shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. 667(b). Section 18(c) states that the Secretary shall approve a state plan if it meets certain prescribed conditions. See 29 U.S.C. 667(c); 29 C.F.R. Pt. 1902 (state plan approval criteria). The Secretary has delegated her authority under the Act to the Occupational Safety and Health Administration (OSHA). See *Martin* v. *OSHRC (CF & I)*, 111 S. Ct. 1171, 1174 n.1 (1991).

2. In 1986, Congress directed the Secretary of Labor to promulgate interim and final standards, pursuant to Section 6 of the OSH Act, to protect the safety and health of employees engaged in hazardous waste operations. See Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, Tit. I § 126, 100 Stat. 1690-1692, *reprinted in* relevant part at 29 U.S.C. 655 note. Section 126(b) of SARA lists eleven subjects, ranging from site analysis to emergency response, to be included (if supported by the rulemaking record) in the final worker protection standard. Section 126(b)(2) specifically requires the standard to include "[r]equirements for contractors to provide initial and routine training of workers." Section 126(d) contains additional direction on specific training and certification requirements. 29 U.S.C. 655 note.

The Secretary promptly issued an interim final standard, effective December 19, 1986, to protect workers engaged in hazardous waste operations and emergency response. 51 Fed. Reg. 45,654 (1986). Thereafter, the Secretary issued a final standard, effective March 6, 1990, establishing a comprehensive program for those workers. 54 Fed. Reg. 9294-9336 (1989); 29 C.F.R. 1910.120. The Federal Register notice explained that the standard applies to

> (1) clean-up operations at uncontrolled hazardous waste disposal sites that have been identified

> for clean-up by a governmental health or environmental agency, (2) routine operations at hazardous waste treatment, storage and disposal facilities * * *, (3) emergency response operations at sites where hazardous substances have been or may be released, and (4) corrective actions at [Resource Conservation and Recovery Act] sites. In addition OSHA has clarified that the agency intends to cover voluntary clean-ups at government identified sites.

54 Fed. Reg. 9295-9296 (1989); see 29 C.F.R. 1910.120(a)(1). The standard imposes substantive requirements with respect to each of the eleven subjects specifically identified in Section 126(b) of SARA and also imposes requirements concerning other topics such as safety and health programs, site control, and sanitation. See 29 C.F.R. 1910.120(b)-(o). The standard contains detailed provisions concerning worker training and certification. 29 C.F.R. 1910.120(e).[1]

The Federal Register notice discussed the effect of the federal standard on state regulation of worker safety at hazardous waste sites. 54 Fed. Reg. 9315-

[1] Its training provision requires, among other things, that "[g]eneral site workers (such as equipment operators, general laborers and supervisory personnel) * * * shall receive a minimum of 40 hours of instruction off the site, and a minimum of three days actual field experience." 29 C.F.R. 1910.120(e)(3)(i). On-site management and supervisors directly responsible for hazardous waste operations must receive the same initial training as the employees they supervise, plus at least eight additional hours of specialized training. 29 C.F.R. 1910.120(e)(4). Documented or certified work experience or training equivalent to the mandated initial training may substitute for the 40 hour requirement, although site-specific training and supervised field experience is also required. 29 C.F.R. 1910.120(e)(9).

9316 (1989). The notice explained that the federal standard responds to Congress's conclusion in SARA that "protection of employees engaged in hazardous waste operations and emergency response" is "a problem of national scope." *Ibid.* It added that Section 18 of the OSH Act allows a State to participate in the protection of those employees, and avoid the preemption of state laws through the submission of a state plan. *Ibid.*

3. On August 23, 1988, while the Secretary's interim final standard was in effect, the State of Illinois enacted the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, Ill. Ann. Stat. ch. 111, paras. 7701-7717 (Smith-Hurd 1991), and the Hazardous Waste Laborers Licensing Act, Ill. Ann. Stat. ch. 111, paras. 7801-7815 (Smith-Hurd 1991). The laws, which are designated as acts "in relation to environmental protection," have a stated legislative purpose "to promote job safety and to protect life, limb, and property." *Id.* at paras. 7701-7702, 7801-7802. They accomplish that purpose principally through the licensing of hazardous waste equipment operators and laborers working at a covered facility. *Id.* at paras. 7704-7707, 7804-7806.[2]

Both laws require a license applicant to provide a certified record of at least 40 hours of training con-

[2] The Illinois laws appear narrower in scope than the OSHA standard because their definition of "facility" does not include any voluntary clean-up sites or emergency response sites. See Ill. Ann. Stat. ch. 111, paras. 7703(f), 7803(e) (Smith-Hurd 1991). In addition, the Illinois laws do not apply to certain classes of hazardous waste workers that are covered by the OSHA standard. See *id.* at paras. 7704(c)-(f), 7804(b)-(e). On the other hand, the Illinois laws do not appear to apply to any sites, or employees on those sites, not covered by the OSHA standard.

ducted "within the State of Illinois," to pass a written examination, and to complete an annual refresher course of at least eight hours of instruction. Ill. Ann. Stat. ch. 111, paras. 7705(c) and (e), 7707(b), 7805(c) and (d), 7806(b) (Smith-Hurd 1991). Additionally, equipment operators, but not laborers (or operator apprentices), are required to have a certified record showing 4000 hours of experience in the operation of equipment used in hazardous waste handling. *Id.* at para. 7705(d). The laws also include provisions for administration and enforcement. See *id.* at paras. 7708-7717, 7807-7815. The State of Illinois has not submitted the laws to the Secretary of Labor for approval as part of a state plan. See OSH Act § 18(c), 29 U.S.C. 667(c).

4. Respondent, a trade association of employers in the hazardous waste remediation industry, brought suit in the United States District Court for the Northern District of Illinois challenging the state laws under the Commerce Clause and the Supremacy Clause of the United States Constitution. See U.S. Const. Art. I, § 8, Cl. 3 and Art. VI, Cl. 2. The district court determined that respondent's Commerce Clause challenge was not ripe, but reached and largely rejected respondent's Supremacy Clause claims. Pet. App. 47-62.

The district court observed that the Secretary had issued a federal standard regulating the "same matter" as the Illinois laws, but concluded that Section 18 of the OSH Act preempts only those provisions of the Illinois laws that lack a "legitimate and substantial purpose apart from promoting job safety." Pet. App. 49, 54. The district court held that the 4000-hour experience requirement substantially advances the State's public safety and environmental protection objective ("to protect life, limb, and property") and therefore is saved from preemption. *Id.* at 58-59, 62. It concluded that the training-within-Illinois provision, on the other hand, does not substantially advance that objective and thus is preempted. *Id.* at 57-58, 62. The district court did not address the other provisions of the Illinois laws.

5. The court of appeals vacated the district court's judgment and remanded the case for reconsideration. Pet. App. 3-43. It first determined, in accord with longstanding precedent, that Section 18 "expressly prohibits states without federally approved state plans from exercising jurisdiction over an occupational health and safety matter as to which OSHA has already duly promulgated a federal standard." *Id.* at 17. The court of appeals concluded, however, that "[t]he language of section 18 of the OSH Act does not indicate whether a state law or regulation that purports to serve a dual purpose is preempted." *Id.* at 14.

The court recognized that "Section 18 is designed to avoid subjecting workers and employers to duplicative regulation, while allowing states the flexibility to tailor worker health and safety programs to their own needs." Pet. App. 19. It observed that Section 18's provisions for federal review of state plans would be thwarted if a State could immunize worker safety and health laws from the process "simply by asserting a non-occupational purpose for the legislation." *Id.* at 18. The court accordingly adopted the following approach:

> When an OSHA standard exists, and the state has not submitted a section 18 plan, we undertake a two-step inquiry. First, we determine whether the challenged state law or regulation constitutes, in a direct, clear and substantial

> way, regulation of worker health and safety. A key factor in resolving this question is whether the state law affects employer-employee obligations with respect to health and safety matters in the workplace. Second, we attempt to extricate from the state law or regulation and invalidate those provisions that relate to worker health and safety in a direct, clear and substantial way. In this connection, we must strike any provision with a dual purpose and effect from which the worker health and safety aspect cannot be removed.

Id. at 19.

Applying that test, the court held that Illinois' 4000-hour experience requirement is preempted because it

> directly, clearly and substantially implicates worker health and safety as well as public health and safety, and it is impossible to modify the provision so as to delete matter serving the impermissible worker health and safety goal without also eliminating matter serving the permissible public health and safety goal.

Pet. App. 29. The court remanded the case with directions that the district court determine whether other provisions in the Illinois statutes also are preempted, observing that the State had not yet given those provisions "concrete form" through implementing regulations. *Id.* at 32.

Writing separately, Judge Easterbrook expressed doubt that Section 18 of the OSH Act should be read as a preemption provision. He suggested that Section 18 could be construed to provide a State with two options: The State may either (1) "oust" the federal standard by submitting a state plan to the

Secretary for approval; or (2) "add to" the federal standard without seeking the Secretary's approval. Pet. App. 35-36. He concluded, however, that if Section 18 does provide a basis for preemption of state law, then the court employed an appropriate test for preemption of "dual purpose" state laws. Pet. App. 34-35, 42.

DISCUSSION

The court of appeals correctly recognized that once the Secretary of Labor has promulgated a federal standard addressing an occupational safety and health issue, a State cannot unilaterally develop and enforce state occupational safety and health standards that relate to that issue. The lower courts have uniformly held that Section 18 of the OSH Act preempts supplementary state worker protection regulation unless it is adopted as part of a federally approved state plan. The courts of appeals are in sharp conflict, however, as to whether Section 18 applies to "dual purpose" safety and health laws that protect both workers and the general public. This case presents an appropriate opportunity to resolve the continuing disagreement among the lower courts on that important issue.

1. The Supremacy Clause authorizes Congress to enact laws that preempt otherwise valid state legislation. U.S. Const. Art. VI, Cl. 2. As this Court has repeatedly stated, the question whether Congress has exercised that power in any given case depends on "Congress' intent in enacting the federal statute at issue." *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 738 (1985). "Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its

structure and purpose.' " *Ibid.*; accord *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 482 (1990).

Section 18 of the OSH Act expresses a clear and unmistakable intent to prohibit the States from unilaterally supplementing a federal standard addressing an occupational safety and health issue with state requirements relating to the same issue. Section 18(a) provides that, when "no [federal] standard is in effect," a State may assert jurisdiction under state law over any occupational safety and health issue. 29 U.S.C. 667(a). Section 18(b) provides, however, that if a State desires to develop and enforce its own occupational health and safety standards "relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated," it must submit a state plan for federal review. 29 U.S.C. 667(b). The consequences of a State's failure to participate in that process are inescapable:

> Although written in the form of a savings clause rather than a direct statement of preemption, this section clearly provides that if a federal standard on an occupational safety and health issue is in effect, a state cannot promulgate an occupational safety and health standard relating to that issue, unless it first submits the state plan to OSHA for approval.

Associated Indus. of Mass. v. *Snow*, 898 F.2d 274 278 (1st Cir. 1990).

Section 18 does not give the States a completely free rein in regulating worker safety and health, but it also does not completely exclude the States from regulating those issues. Rather, Section 18 requires that a State develop its regulatory program in coordination with federal regulations respecting the

same issues. The Section 18 process requires a State to examine the scope and content of the Secretary's standards to determine whether it may directly regulate a particular occupational safety and health issue, or whether it may do so only through submission of a state plan. See S. Bokat & H. Thompson, *Occupational Safety and Health Law* 681 (1988) ("The state plan concept set forth in the Act is, in essence, a scheme of administratively controlled preemption.").

Petitioner acknowledges that a State cannot "displace" a federal standard except through submission of a state plan, but she asserts that a State need not submit such a plan if it seeks only to "supplement or add to OSHA standards in a manner which does not conflict with OSHA." Pet. 11-12. That argument—which parallels Judge Easterbrook's analysis, but finds no case support—is inconsistent with the language of Section 18. That Section quite plainly provides that a State "shall submit a State plan" if it desires to assume responsibility for developing or enforcing a state standard "relating to" an OSHA-regulated safety or health issue. 29 U.S.C. 667(b). Section 18(b)'s mandatory directive is not limited to state efforts that would "displace or conflict with" (Pet. 11-12) a federal standard. State standards that "supplement or add to" a federal standard also "relat[e] to" the OSHA-regulated issue. See, *e.g.*, *Metropolitan Life Insurance Co.*, 471 U.S. at 739; *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). See also S. Bokat & H. Thompson, *supra*, at 683 & n.15 ("Unlike many other federal laws, the OSH Act does not afford the states complete freedom to enact supplementary or complementary requirements in areas addressed by federal standards.");

id. at 686 n.28 ("Section 18(b) of the Act permits states to adopt more effective standards only through the vehicle of an approved state plan.").[3]

Thus, the court of appeals properly rejected petitioner's argument that Section 18 of the OSH Act lacks preemptive force. It correctly held—as has every other court that has addressed the issue—that "section 18 unquestionably preempts any state law or regulation whose sole purpose and effect is to establish a standard pertaining to worker health and safety where OSHA has already promulgated such a standard and that state has not obtained the Secretary of Labor's approval for its own plan." Pet. App. 14.[4]

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[3] The legislative history also supports that conclusion. Congress rejected proposals that would have preempted, as a permanent matter, only those state regulations that were "in conflict" with a federal standard. S. 2788 and H.R. 13373, 91st Cong., 1st Sess. § 14(b)(1) (1969), *reprinted in* Subcomm. on Labor, Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* at 58, 706 (Comm. Print 1971) (*Leg. Hist.*). It also rejected proposals that would have permitted any state standard affording "significantly greater protection" than a federal standard. S. 2788 and H.R. 13373, *supra*, § 14(b)(2), *reprinted in Leg. Hist.* 58, 706.

[4] See, *e.g.*, *Associated Indus. of Mass.* v. *Snow*, 898 F.2d at 278; *Environmental Encapsulating Corp.* v. *City of New York*, 855 F.2d 48, 55 (2d Cir. 1988); *Farmworker Justice Fund, Inc.* v. *Brock*, 811 F.2d 613, 625-626, 640-641 (D.C. Cir. 1987), opinion vacated on other grounds, 817 F.2d 890 (D.C. Cir. 1987); *Ohio Mfrs. Ass'n* v. *City of Akron*, 801 F.2d 824, 828 (6th Cir. 1986), appeal dismissed and cert. denied, 484 U.S. 801 (1987); *United Steelworkers* v. *Auchter*, 763 F.2d 728, 736 (3d Cir. 1985); *Five Migrant Farmworkers* v. *Hoffman*, 136 N.J. Super. 242, 345 A.2d 378, 380 (1975); *Columbus Coated Fabrics* v. *Industrial Comm'n*, 1 O.S.H.C. (BNA) 1361 (S.D. Ohio 1973). See also Pet. App. 17 (collecting additional cases).

2. Although the courts agree that Section 18(b) has a preemptive effect, they disagree as to its application where a State has adopted so-called "dual purpose" safety and health regulations. This case marks the fifth time since 1985 that a court of appeals has grappled with the question whether Section 18(b) preemption extends to state or local laws that are directed at promoting the safety and health of both workers and non-workers. The courts of appeals have adopted two fundamentally different approaches.

The First, Second, and Third Circuits have essentially held that a State may enforce a state safety and health requirement that protects workers—even though the state requirement relates to an issue addressed by an OSHA standard and the State has not submitted a Section 18(b) state plan—if the regulatory requirement at issue also protects non-workers. Those courts have developed three different analytical approaches for distinguishing state laws that protect only workers from those that protect a broader category of persons:

(a) The First Circuit looks "to the effect of the regulatory scheme." *Associated Indus.* v. *Snow*, 898 F.2d at 279. The court explained:

> If the effect is to protect the public, the state regulation is not preempted. If the effect is *solely* to protect workers, the OSHA Standard prevails and the state regulation falls. If the effect is to protect the public by regulating workers and work places, the regulation stands because its ultimate effect is protection of the public.

Id. at 280 (emphasis added).[5]

(b) The Second Circuit considers whether "there is a legitimate and substantial purpose apart from protecting * * * workers." *Environmental Encapsulating Corp.* v. *City of New York*, 855 F.2d 48, 57 (1988). The court stated that "[i]f this is demonstrated, the particular requirement is not a state 'occupational safety and health standard' preempted by § 18 [of the OSH Act]." *Ibid.*[6]

(c) The Third Circuit inquires into the "primary purpose" of the state law. See *Manufacturers Ass'n of Tri-County* v. *Knepper*, 801 F.2d 130, 138 (1986), cert. denied, 484 U.S. 815 (1987). In applying that test, the Third Circuit has held that a state requirement is not subject to preemption if "the statutory purpose * * * is broader than workplace safety." See *Manufacturers Ass'n of Tri-County*, 801 F.2d at 136.[7]

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[5] The First Circuit applied that test to Massachusetts' asbestos abatement requirements. The court concluded that the State could regulate work practice and licensure, certification and training, and protective clothing requirements, based on the State's interest in protecting the general public from asbsetos exposure. 898 F.2d at 281. The court indicated that the regulations requiring respirators and medical monitoring for workers are preempted under its test. *Id.* at 281, 284.

[6] The Second Circuit applied that test to New York City's asbestos abatement requirements. The court upheld most of those requirements, including instruction on worker personal hygiene and on air monitoring, on the ground that they "have a legitimate and substantial purpose to promote public health and safety." 855 F.2d at 57. It invalidated two training requirements that "have as their sole purpose the promotion of occupational safety and health." *Ibid.*

[7] The Third Circuit applied its test to Pennsylvania's "hazard communication" requirements. The court held that

Although those three courts disagree as to whether one should look to the "primary purpose," a "substantial purpose apart," or the "effect" of the state law, they essentially agree that Section 18(b) does not apply to and cannot preempt state safety and health requirements that protect both workers and non-workers.

The Seventh Circuit has adopted a different approach in this case that marks a clear break with the other courts of appeals. The Seventh Circuit has ruled that Section 18(b) of the OSH Act applies to state laws that have "direct, clear and substantial effects on worker health and safety"—even if the state regulation also protects non-workers. Pet. App. 19. The court has indicated that an attempt should be made to separate the requirements affecting worker safety and health from those affecting non-workers. *Ibid.* It has unequivocally stated, however, that Section 18(b) prevents enforcement of a state law that has "a dual purpose and effect from which the worker health and safety aspect cannot be removed." *Ibid.* Thus, the Seventh Circuit—unlike the First, Second, and Third Circuits—holds that Section 18(b) does apply to and can preempt state safety and health laws that protect both workers and non-workers.

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the state provisions dealing with worker education and training are preempted, but provisions dealing with hazard surveys, labeling, and material safety data sheets are not totally preempted. See 801 F.2d at 136-142. The Third Circuit first formulated that test in *New Jersey State Chamber of Commerce* v. *Hughey*, 774 F.2d 587, 592-596, on remand, 868 F.2d 621 (1985), cert. denied, 492 U.S. 920 (1989). The court held that New Jersey's hazard communication provisions dealing with workplace surveys and labeling are preempted, but provisions dealing with environmental surveys and labeling are not. See 774 F.2d at 595-596; see also 868 F.2d at 628.

We submit that the Seventh Circuit's approach is the correct one. The Secretary of Labor has long maintained that Section 18(b) of the OSH Act applies to state laws if a primary purpose or effect of the state law is to regulate a worker safety and health issue already addressed by a federal standard. The Secretary's view is based on a straightforward reading of the statute. Section 18(b) plainly provides that once the Secretary has promulgated a federal standard addressing a particular occupational safety or health issue, a State may not develop and enforce "occupational safety and health standards" relating to that issue unless it submits a state plan for approval. 29 U.S.C. 667(b). A state law requirement that has a primary purpose or effect of protecting worker safety or health remains an "occupational safety and health standard" even if it also protects non-workers. That conclusion is consistent with the OSH Act's definition of an "occupational safety and health standard," which does not exclude state dual-purpose laws from the meaning of the term. See § 3(8), 29 U.S.C. 652(8).

The Seventh Circuit's decision is consistent with the Secretary's position. The court first determined that "an OSHA standard exists, and the state has not submitted a section 18 plan." Pet. App. 19. The court then inquired whether the Illinois law "constitutes, in a direct, clear and substantial way, regulation of worker health and safety." *Ibid.* It found that Illinois' 4000-hour experience requirement (the only state law provision contested on appeal that the district court squarely addressed) satisfies that description and that it is not possible to separate its "worker health and safety goal" from the "public health and safety goal." *Id.* at 29. The court therefore concluded that Illinois' failure to include that requirement as a part of a state plan, in accordance with Section 18(b), rendered it unenforceable. The Seventh Circuit's verbal formulation differs somewhat from that of the Secretary. Nevertheless, the court's analysis—like that of the Secretary, and unlike that of the other courts of appeals—properly focuses on whether the state regulation significantly affects worker safety and health.

3. Although we believe that the Seventh Circuit adopted the correct approach, we submit that this Court should nevertheless grant the petition for a writ of certiorari and resolve the question whether Section 18(b) applies to "dual purpose" safety and health regulations. The question whether Section 18(b) applies to such laws is clearly important. The Secretary has adopted numerous federal standards, pursuant to Section 6 of the OSH Act, to protect worker safety and health. See 29 C.F.R. Pt. 1910. As the litigation in the various circuit courts demonstrates, the States have increasingly attempted to supplement those federal standards with state legislation that simultaneously protects workers and the general public. The States, employers, and employees are in need of clear guidance whether such dual-purpose regulatory requirements may be enforced in the absence of a state plan.

Additionally, the issue is ripe for this Court's review. The question whether Section 18(b) applies to a State's "dual purpose" regulations first reached this Court in 1987, through a petition for a writ of certiorari to review the Third Circuit's decision in *Manufacturers Ass'n of Tri-County* v. *Knepper*, *supra*. The Court invited the United States to file a brief in that case expressing the federal government's views.

We submitted that the decision was incorrect, but we urged that resolution of the issue should await further developments. See U.S. Amicus Br. at 14-18, in *Manufacturers Ass'n of Tri-County* v. *Knepper*, cert. denied, 484 U.S. 815 (1987) (No. 86-1102). Since that time, the First and Second Circuits have essentially followed the Third Circuit's approach, while the Seventh Circuit has rejected that approach in this case. The conflict among those courts is real. As the Seventh Circuit observed, this case would be resolved differently under the standard announced by the other courts. Pet. App. 29-32. Unless this Court acts, that conflict among the circuit courts is likely to persist.

The consequences of this conflict are substantial. Section 18(b) was intended, in part, to encourage more uniform regulation of occupational safety and health issues having nationwide effect. The conflict among the decisions of the courts of appeals, however, has resulted in Section 18(b) being applied in a non-uniform manner. States located in the First, Second, and Third Circuits have broader authority than States located in the Seventh Circuit to regulate occupational safety and health issues without submitting a state plan. The States located in the First, Second, and Third Circuits may avoid the state plan requirement by simply formulating their statutes or rules as "dual purpose" regulations.

Finally, there is little to be gained by postponing review until the district court has completed proceedings on remand. The conflict among the courts of appeals arises from a fundamental disagreement whether Section 18(b) applies to "dual purpose" safety and health laws. The Seventh Circuit holds that it does, while the First, Second, and Third Circuits hold that it does not. That disagreement will

result in inconsistent application of Section 18(b) of the OSH Act to the various States. The district court's proceedings on remand will serve only to determine whether particular elements of the Illinois laws are wholly worker-related, wholly non-worker-related, or whether they have a dual purpose or effect. Those proceedings, however, will do little to clarify the purely legal question whether Section 18(b) applies to the dual-purpose elements. That is the source of disagreement among the circuit courts, and that is a matter that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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